

Coordinating Personnel Policies with the County Plan

Jeremy G. Knight / Strong & Hanni Law Firm
801-532-7080; jknight@strongandhanni.com

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Coordinating Personnel Policies with the County Plan and the Law.

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Agenda

- RECRUITING
- TRAINING
- PERFORMANCE REVIEWS
- PERFORMANCE IMPROVEMENT
 - Discipline

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THE RECRUITING PROCESS

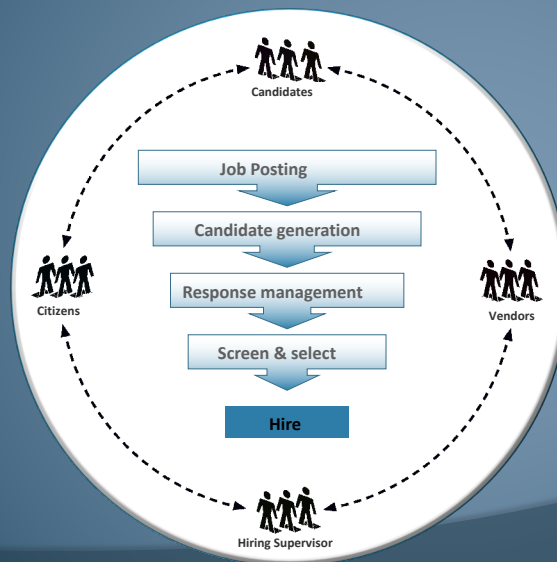
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Benefits of Effective Recruiting

- Minimizes hard costs.
- Minimizes missed opportunity costs of not having a position filled.
- Improves productivity and longevity.
- Drives organizational improvements, productivity, and results.

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Recruiting Process Overview



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Job Posting

- Wording is critical
 - Minimum Requirements
 - Take your time
 - Take no word for granted
 - Evaluate the potential legal ramifications
 - Talk to multiple people about the description of duties
 - Take the posting to your interviews
 - Go through it with the candidate

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Posting is the Formal Job Description

- Keep master copy on file.
- Do not be afraid to make changes
 - Amend master
 - Give copy to employee and supervisor(s).
- Key Component of Performance Reviews and Performance Improvement.
- Will always be identified as a relevant document in a wrongful termination lawsuit.

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Use Discrimination Neutral Language

- It is illegal for an employer to publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.
- For example, a help-wanted ad that seeks "females" or "recent college graduates" may discourage men and people over 40 from applying and may violate the law.

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PRE-EMPLOYMENT TESTS

- Competitive recruitment process may require a pre-employment assessment.
- Can be a recruitment related lawsuits nightmare.
- Remember, assessments need to avoid the following:
 - Discrimination or a discriminatory affect
 - If you're hiring a custodian, a typing exam could be discriminatory
 - Require unreasonably high or restrictive standards that are not job-relevant
 - Invade Privacy

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Interview Process

- Remember: It is illegal for an employer to discriminate against a job applicant because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.
- Example: You need to explain the job requirements in such a way that it provides equal opportunity to every applicant.
- Example: If a job applicant with a disability needs an accommodation (such as a sign language interpreter) to interview for a job, the employer is required to provide the accommodation, so long as the accommodation does not cause the employer significant difficulty or expense.

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CREDIT REPORTS

- If an employer checks credit reports when hiring employees, it must follow the legal rules set out in the federal Fair Credit Reporting Act (FCRA). The FCRA requires employers to:
 - Get the applicant's consent before pulling the report;
 - Give the applicant a warning (along with a copy of the report received) if the employer plans to reject the applicant on the basis of the report; and
 - Give the applicant an official adverse action notice if the employer does not hire him or her because of the contents of the report.

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TAKE-AWAY

- Plan is to hire the best employees for the job and stay out of legal trouble.
- Discrimination is the biggest concern.
- Be an equal opportunity employer.
- Merit should be the only consideration, and should be indelibly burned in your County recruitment plan.
- Consult the CPMA (Utah Code Ann. § 17-33-5).

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Training Programs

- It is illegal for a training or apprenticeship program to discriminate on the bases of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.
- Beware of Adverse Impact.
 - Adverse impact occurs when a decision, practice or policy has a disproportionately negative effect on a protected group, even though the adverse impact may be unintentional.

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Anti-Discrimination & Sexual Harassment Training

- MANDATORY for ALL employees.
- Once a year.
- Make each attendee sign a roll-sheet.
- Take it seriously.
- Make it part of each new-hire's orientation.

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Train Your Supervisors

- “An employer is directly liable for an employee’s unlawful harassment if the employer was negligent with respect to the offensive behavior.” *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 (2013).
- If the harasser is a supervisor rather than merely a co-worker, however, the employer may be vicariously liable for the conduct, depending on the circumstances. *Id.*
- If the supervisor’s harassment culminates in a “tangible employment action,” the employer is strictly liable for sex discrimination, with no defense. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762-63 (1998).

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Top Legal Mistakes by Supervisors

- Mishandling Employee Complaint Issues.
- Failing To Apply Policies, Procedures And Employee Discipline Consistently.
- Failure To Give Constant Feedback (Good And Bad) To Employees And Failure To Document Problems.
- Failing To Conduct Honest & Effective Performance Reviews.
- Failing To Understand & Follow The Ever-changing Wage & Hour Laws.

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Top Legal Mistakes by Supervisors (Cont.)

- Creating A Perception Of Retaliation.
- Failing To Promptly Respond To Leave And Accommodation Requests.
- Carelessly Using E-mail or texting.
- Failing To Keep Good Records.

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PERFORMANCE

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Job Assignments & Promotions

- It is illegal for an employer to make decisions about job assignments and promotions based on protected status.
- For example:
 - May not give preference to employees of a certain race when making shift assignments.
 - May not segregate employees of a particular national origin from other employees.
- Beware of Adverse Impact.

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Job Assignments & Promotions (Cont.)

- May not base assignment and promotion decisions on stereotypes and assumptions about protected matters.
- If require employees to take a test before making decisions about assignments or promotions:
 - Test may not exclude people of a particular race, color, religion, sex (including pregnancy), or national origin, or individuals with disabilities, unless the employer can show that the test is necessary and related to the job.
 - May not use a test that excludes employees age 40 or older if the test is not based on a reasonable factor other than age.

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Pay And Benefits

- It is illegal to discriminate against an employee in the payment of wages or employee benefits on the bases of protected status.
 - Employee benefits include sick and vacation leave, insurance, access to overtime as well as overtime pay, and retirement programs.
 - Mantra: “equal pay for equal work.”
- In some situations, an employer may be allowed to reduce some employee benefits for older workers, but only if the cost of providing the reduced benefits is the same as the cost of providing benefits to younger workers.

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PERFORMANCE IMPROVEMENT

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Employment Laws Do Not Mandate Performance Appraisals

- Should you still do them?
- YES!
- Law does prohibit discriminatory employment actions based on non job-related factors.
- Best defense is a good offense.
- Develop an effective evaluation process:
 - consistent application;
 - unbiased evaluation; and
 - timeliness.

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Performance Appraisal Advice

- Focus on the good and the bad.
- Be timely.
- Do not over-evaluate.
- Do not use labels instead of descriptions.
- Avoid extremes.
- HR plays key role in reviewing performance appraisals.
- Discipline should flow from performance reviews.

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DISCIPLINE

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CONSTITUTIONAL REQUIREMENTS

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PROPERTY INTEREST?

- An entitlement to continued employment only arises when the local “rules or mutually explicit understandings” place “substantive restrictions on a government actor’s discretion to make personnel decisions.”
- Example: when County policies specify that an employee can only be terminated for cause.

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Due Process Requirements

- Once a property right arises, it is the duty of the court to decide what process, under the Constitution, is due before a plaintiff may be deprived of that right.
- Full evidentiary hearing is not required.
- Due process only requires adequate “notice and an opportunity to respond,” both of which should be “appropriate to the nature of the case.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

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PRE-ACTION NOTICE

- Requirement is not stringent.
 - Hold yourself to a higher standard.
- FIRST STEP:
 - Make sure reviews are consistent and thorough.
 - NOT notice, but lays the foundation.
- SECOND STEP:
 - Draft a formal letter whenever possible.

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PRE-ACTION NOTICE LETTER

- Specific findings of wrongdoing against the employee
 - Provide evidence (attach exhibits if possible)
 - Carefully evaluate and stick to it
- State the highest potential consequence
 - Demotion
 - Termination
- Give a date and time for a hearing/meeting
 - Does not have to be formal
 - During work hours

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PRE-ACTION HEARING

- Need not be elaborate.
- Minimum requirements (*Loudermill*, 470 U.S. at 545):
 - provide the employee with notice of the charges or reasons for his discharge;
 - an explanation of the evidence against him; and
 - an opportunity to present his side of the story..

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POST-ACTION DUE PROCESS

- The holding in *Loudermill* rested partially on the availability of a full post- termination hearing under applicable state law.
 - "Under *Loudermill*, the adequacy of pre-termination procedures must be examined in light of available post-termination procedures."

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Full-Blown Adversarial Hearing

- *Loudermill* established that some form of pre-termination hearing, plus a "full-blown adversarial post-termination hearing" are required when a property interest in continued employment is at stake. *Calhoun v. Gaines*, 982 F.2d 1470, 1476 (10th Cir. 1992).
- "A 'full post-termination hearing' is understood to include the right to representation by an attorney and the right to cross-examine adverse witnesses." *Workman v. Jordan*, 32 F.3d 475, 480 (10th Cir. 1994).

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Full-Blown Adversarial Hearing (cont.)

- Legal proceeding , similar to a trial.
- Evidence is presented to a decision maker.
 - If CPMA applies, then CSC
 - Hearing Officer
 - Review Board
- Each party is entitled to present evidence.
 - Witness testimony
 - Documentation.
- Decision Maker makes a decision based on the evidence presented by both parties.

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Grievance Process?

- Only Full-Blown Adversarial Hearing is Constitutionally Required.
- Grievance Process with defined steps helps to show that employee was given ample process. (Required by CPMA)
- Extensive Procedure Example: CAREER SERVICE REVIEW OFFICE
 - Step 1 - written grievance to the immediate supervisor;
 - Step 2 - Either the agency or division director reviews the grievance.
 - Step 3 - Either the department head, executive director or commissioner reviews the grievance.
 - Step 4 - CSRO reviews the grievance and conducts an evidentiary hearing if it has jurisdiction.
- Employee is responsible for advancing the grievance through the steps within applicable time limits.
- Time limits for the steps are established by statute.

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